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No. 82-516

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF SOUTH CAROLINA, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Commission properly permitted line-haul railroads instead of terminal switching railroads to retain demurrage charges collected from shippers for the prolonged retention of cars owned or paid for by the line-haul carrier but kept on the tracks of the terminal switching carrier.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 27a-35a) is not reported. The opinions of the administrative law judge (Pet. App. 1a-9a) and the Review Board (Pet. App. 10a-15a) of the Interstate Commerce Commission are not reported. The Commission's opinion (Pet. App. 16a-26a) is reported at 365 I.C.C. 274.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1982. The petition for a writ of certiorari was filed on September 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. A railroad assesses demurrage charges against shippers when they fail to unload cars within a specified period. The charges serve two purposes: "One is to secure compensation for the use of the car and the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention." *ICC* v. *Oregon Pacific Industries, Inc.*, 420 U.S. 184, 189-190 (1975), quoting *Turner Lumber Co.* v. *Chicago, M. & St. P. Ry.*, 271 U.S. 259, 262 (1926). The period of "free time" and the charges for cars held beyond that period are set forth in the tariff filed with the Interstate Commerce Commission. Accordingly, the demurrage charges are subject to review by the Commission to assure that they are reasonable. 49 U.S.C. (Supp. IV) 10701(a) and 10707(a).

2. Respondents Seaboard Coast Line Railroad Company and Southern Railway are line-haul carriers that deliver grain to elevators in Charleston, South Carolina under a tariff that specifies rates for through movements from the grain's origin to the elevator (Pet. App. 22a). Because the line-haul carriers' tracks end about a mile from the elevator, however, the Port Terminal Railroad of South Carolina, which is an agency of petitioner State of South Carolina, moves the cars on its tracks between the line-haul carriers' tracks and the elevator (*id.* at 3a). The terminal railroad assesses a switching charge on each car, which the line-haul carriers partially absorb (*id.* at 22a).[1]

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[1] "Absorption" means that the line-haul carrier instead of the shipper pays the switch charge. When the dispute between the terminal railroad and the line-haul carriers arose in 1977, the line-haul carriers absorbed all of the switching charge. By the time of the Commission's final decision in

In 1977, the line-haul carriers ended the terminal railroad's practice of retaining the shipper's demurrage charges by adding to their grain tariff a new rule specifying that the demurrage would be paid to the line-haul carriers (Pet. App. 17a-18a). The terminal carrier, which derived a substantial portion of its revenue from demurrage, petitioned the Commission to suspend the new tariff provision,[2] but the Commission refused. The Commission also denied a request for a declaratory order on the new demurrage rule's lawfulness (*id.* at 2a).

The terminal carrier then filed a complaint against the tariff provision under 49 U.S.C. (Supp. IV) 10701. An administrative law judge found the line-haul carrier's demurrage rule unlawful (Pet. App. 1a-9a). He concluded that the terminal carrier incurred the bulk of the expense in keeping cars on its tracks so they would be available to the grain elevator and thus held that it would be equitable to allow it to retain the demurrage charges (*id.* at 7a-8a). The Commission's Review Board adopted the findings and conclusions of the ALJ and affirmed (*id.* at 10a-15a).

3. The Commission reversed the Review Board's decision and dismissed the complaint (Pet. App. 16a-26a).[3] The Commission applied the principle that the

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1981, the line-haul carriers were absorbing about two thirds of the charge (Pet. App. 22a).

[2] Pursuant to 49 U.S.C. (Supp. IV) 10707, the Commission can suspend the effectiveness of a proposed tariff for a limited time.

[3] While the request for administrative review by the Commission was pending, the line-haul carriers had sought judicial review of the Board's decision. *Seaboard Coast Line R.R.* v. *ICC*, No. 81-1146 (4th Cir. Feb. 9, 1981). Following the Commission"s decision to review the Board's decision, the

delivering carrier should keep the demurrage charges (*id.* at 21a). The Commission found that the terminal carrier was acting as the agent for the line-haul carriers and thus the latter was the delivering agent. The Commission found support for this conclusion in the facts that all charges were included in one tariff in the name of the line-haul carriers and that the line-haul carriers incur substantial costs when their cars, or cars for which they pay per diem,[4] are detained, and that those costs are not recovered. Accordingly the Commission permitted the line-haul carriers to keep the demurrage charges (Pet. App. 23a, 25a). The Commission did recognize that the terminal carrier also incurs expenses when detained cars congest its tracks, but found that these costs did not entitle

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court of appeals dismissed the line-haul carriers' petition for review.

[4] Whenever a railroad has on its lines a car it does not own, the railroad must pay a daily fee, known as "per diem," to the car's owner. Because the terminal carrier owns no cars, it must pay per diem on all the cars it switches. As a terminal railroad, however, it is entitled to a refund of per diem charges under a universal railroad industry practice known as "per diem reclaim." On the other hand, per diem reclaim only compensates terminal railroads for their per diem payments. *New Orleans Public Belt Railroad Switching & Absorptions*, 235 I.C.C. 613, 623-624 (1940), and has nothing to do with the charges terminal railroads assess for their switching service. *Car Rental and Switching at Memphis*, 286 I.C.C. 553, 555 (1952).

In this case, the line-haul carriers refund to the terminal carrier the first five days of per diem charges. This arrangement entirely compensates the per diem expenses, because the terminal carrier has never had cars such as those at issue in this case on its lines for more than five days (Pet. App. 22a n.5).

it to keep the demurrage charges because the terminal carrier could raise its switching charges to cover the expenses it incurs in rendering its services to the grain elevators (*ibid.*).

4. The court of appeals affirmed (Pet. App. 27a-34a). It held that the Commission's determinations that the terminal carrier is the line-haul carriers' delivery agent, and that the line-haul carriers bear the detention costs, are "substantially supported by the record and prior decisions of the I.C.C." (*id.* at 32a-33a). The court rejected petitioners' various contentions that the line-haul carriers' demurrage rule is unreasonable in its application (Pet. App. 33a-34a).

ARGUMENT

Petitioners contend (Pet. 6) that the Commission's decision is an unexplained departure from the precedent governing collection of demurrage charges and will undercut efficient rail car utilization and terminal railroads' ability to render adequate service. These claims are without merit.

As petitioners acknowledge (Pet. 7), this case is governed by the well-established principle that the delivering carrier should be compensated by demurrage, and that the delivering carrier is the railroad that incurs the costs of detention. The Commission applied this principle and found that the line-haul carriers incur otherwise unrecoverable costs when the elevator uses as a warehouse cars that the line-haul carriers own or pay per diem on (Pet. App. 21a, 23a, 25a).[5]

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[5] Petitioners' argument (Pet. 6, 8-9) that the Commission has sanctioned charges by one railroad for services performed by another is without foundation, because it assumes that

Thus, what petitioners really challenge is the Commission's factual determination that the line-haul carriers bear the costs of detention. Petitioners did not, and do not now, deny, however, that the line-haul carriers incur costs when cars they own or pay per diem on are detained by the elevator. Nor can petitioners dispute that demurrage is designed in part to compensate carriers for exactly the kinds of costs the line-haul carriers incur at Charleston. *ICC* v. *Oregon Pacific Industries, Inc.*, 420 U.S. 184, 189-190 (1975).[6]

Instead, petitioners argue that the terminal carrier's expenses entitle it to keep the elevator's demurrage payments. The Commission addressed and rejected this argument because it found that the terminal carrier, unlike the line-haul carriers, can at least theoretically recover its expenses by raising its switching charges. This essentially factual determination is reasonable and supported by the record and accordingly was properly upheld by the court of appeals.[7]

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only the terminal carrier is rendering any "service" and entirely ignores the expense incurred from the grain elevator's use of the line-haul carriers' cars.

[6] Petitioners concede (Pet. 13, 14) that it would be unfair to make a carrier pay per diem on detained cars without also giving that carrier demurrage charges to cover the per diem payments, yet that is exactly the position the line-haul carriers occupied prior to their 1977 tariff change.

[7] There is no merit to petitioners' contention that the Commission has undermined the principles of efficient car utilization. As the Commission (Pet. App. 24a) and the court of appeals (*id.* at 33a-34a) found, and as petitioners concede (Pet. 13-14), the elevator determines how long cars are detained, and which railroad ultimately keeps the resulting demurrage charges has no effect on how quickly cars are released.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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